No. 12105

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

APEX FISH COMPANY, a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE, APEX FISH COMPANY, A CORPORATION

EDWARD M. HAY
and
DAVID O. HAMLIN,
AXEL C. JULIN (*Of Counsel*)
Proctors for Appellee.

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I.

STATEMENT OF THE CASE

A. FACTS

On August 23, 1946, the SS "DENALI," which was then being operated by Appellant, arrived at Appellee's saltery at Port Wakefield, Alaska, and proceeded to load a shipment of salt herring packed in barrels. There were 110 quarter barrels of medium herring, 119 half barrels of large herring and 1,129 half barrels of medium herring. Loading was accomplished by the ship's crew and no one on behalf of Appellee visited the ship's hold nor was apprised of where the herring was being stowed, save the fact was apparent that the herring was being loaded into No. 3 and No. 4 holds. Loading was completed and the vessel sailed at 8:12 a.m. August 24, 1946.

At 6:40 p.m. on September 4, 1946, the "DENALI"

arrived at the Bell Street Terminal in Seattle, Washington (Aps. 374). Discharge of the cargo in suit commenced on 8:30 p.m. on that day and was suspended when only 971 half barrels were discharged. Libelant's inspector, Peter A. Wahl, was waiting on the dock and immediately opened and inspected the barrels (Ex. 12, Aps. 183). He noted the contents were spoiled and at once notified the ship (Libelant's Interrogatory No. 16 and Respondent's Answer thereto). He then opened all of the 971 barrels and concluded that contents of all of them had been damaged by stowage in a warm place (Ex. 12).

Appellee's agent, James Farrell & Co., was notified of the damage and immediately engaged Mr. J. M. Kniseley, a chemical engineer employed by I. F. Laucks & Co., and Captain L. C. Perry, a marine surveyor of many years experience, to inspect the 971 barrels. No inspection of the portion of the shipment in No. 4 hold was made immediately for the reason that the same was not discharged until September 25, 1946.

Captain Perry arrived at Bell Street Dock at 10:00 a.m. on September 5, 1946, and entered upon his inspection with Mr. Wahl. Mr. Kniseley arrived in the afternoon and together they proceeded to take various temperatures at about 3:00 p.m. Barrels of libelant's spoiled herring were selected at random and their internal temperatures recorded. Mr. Kniseley used a 15-inch thermometer which was thrust into the center of the barrels. Temperatures ranged from 70°F. to 77°F. in these barrels (Aps. 207). The barrels had been placed in an unheated covered dock

warehouse at the time of discharge and had been off the ship about 19 hours at the time of taking the temperatures (Aps. 210, 211). The temperature of the dock at the same time was 68°F. (Aps. 208). An unspoiled barrel of herring from another shipment stored on the dock was recorded as having a temperature of 65°F. The temperature in Seattle from the time of the arrival of the cargo to the time of these readings at no time exceeded 69°F. (Ex. 10).

Mr. Kniseley and Captain Perry then proceeded aboard the "DENALI" and entered the No. 3 lower hold. The temperature at the point where the herring had been stowed in No. 3 lower hold was 80°F. (Aps. 208). It was discovered that the 971 barrels had been stowed between the two shaft alleys of the "DENALI" which are rounded on top and about seven feet high running parallel fore and aft. These shaft alleys were entered by these witnesses and found to contain a number of steam pipes along their inboard sides which were not insulated at the joints. Some of these pipes contain live steam and others contain hot water (Aps. 442, 446). Included among these pipes are an inch and one-half live steam line, a one-half inch return line (Aps. 336, 337) at three inch steam line and four inch return line and additional steam pipes and returns varying from three-quarters of an inch to one inch in diameter (Aps. 339). Live steam was even yet leaking from some of the joints, although the ship had been completely shut down about five hours before (Aps. 442). There is no question but that these shaft alleys generate heat (Aps. 333).

The 971 barrels varied in condition, but not a sin-

gle barrel escaped damage. A layer of clear oil lay on top of the brine and the fish were soft. The worst ones had decayed and gave off an offensive odor. The degree of spoilage was found to be in direct proportion to the degree of heat recorded in each barrel, the warmer barrels being the most severely damaged (Aps. 209). Of this lot 354 were adjudged unfit for any use except reduction for oil (Aps. 256). The remaining 617 half barrels were placed in storage in the hope they might have some value.

The 387 barrels of herring in No. 4 lower hold were also stowed between the shaft alleys and in addition were overstowed with cartons of canned salmon. When outturned they were immediately inspected and found to be similarly damaged, but on the whole not quite as badly as those in No. 3 lower hold. The heated engine room lies just forward of No. 3 hold separated by an alley way from the forward bulkhead of No. 3. No. 4 is aft of No. 3 and has the same shaft alleys running through the lower portion thereof. A shipment of salt herring in No. 1 hold also detained during the maritime strike outturned completely undamaged. There are no steam lines or shaft alleys in No. 1 hold.

Of this lot of 387 barrels 278 were adjudged wholly unfit for human consumption and 109 were considered as having some possible salvage value (Aps 255). Every barrel in the shipment was damaged to some extent (Aps. 210, 255, 256). It was clear that the entire shipment had been literally cooked causing the oil to leave the fish and rise to the top of the barrel leaving the flesh of the fish soft and the scales with a tendency to slough (Aps. 324).

Appellant has conceded that Appellee's loss is properly fixed by the decree at $18,783.92 (Appellant's brief page 6). No purpose would therefore be served by detailing the facts regarding damage, except to note that none of the salvaged cargo was sold nor saleable for any amount in excess of 75% of the going market value and much of it sold for less.

The packing and processing of this herring prior to shipment was all done under the personal supervision of Lee H. Wakefield, Appellee's president. Mr. Wakefield testified that he has been in the business of processing and marketing salt herring in Alaska for a period of 32 years commencing in 1916 (Aps. 103). Until 1931 his duties were primarily supervisory at the salteries and in addition he handled the marketing of the finished product. During this period he also engaged for a time in the salmon canning business. He spent all or a part of each herring season at various herring processing plants during this period and by observation and participation acquired an intimate knowledge of each step in the processing and curing of salt herring.

In 1931 Mr. Wakefield assumed the actual job and responsibility of herring curer at the plant of Apex Fish Company and held this job down to and including the date of the shipment involved herein. As such he participated to a greater or less extent in each step of the process of curing herring. During this time he was likewise in sole charge of marketing appellee's finished product usually through the common brokerage channels. His personal interest in the op-

eration of appellee's plant is clear in view of his ownership of a majority of the capital stock and his position as president of the corporation (Aps. 107).

Part of the business of appellee is the processing and sale of salt herring. Its plant is located on Raspberry Island in the Territory of Alaska. Specifically it is located approximately 30 nautical miles northwest of Kodiak, Alaska, which latter point is at latitude N. 57°45′ longitude W. 152°31′ (Exhibits 4 and 9). Port Wakefield is located within that area of Alaska designated by the United States Department of Commerce Weather Bureau as the "southern division."

Appellee's plant also houses the operation of a reduction plant which produces herring meal and oil. Only the very choicest fish are selected for the salt herring operation, the remainder being shunted into the meal and oil section of the plant.

Herring are brought to the plant daily, weather permitting, in fishing boats. Radio contact is maintained by appellee with the fishing boats and an accurate check made as to the time elapsing between catching of the herring and arrival at the plant (Aps. 116). Herring which have been caught more than ten hours previous to delivery are rejected by the saltery and directed into the meal and oil plant (Aps. 115).

The herring involved in this action were received at the plant from July 24 to August 10, 1946, inclusive (Ex. 7). Mr. Wakefield personally met about half of the fishing boats at the dock during this period and made the primary inspection of the fish (Aps. 122).

The remainder of the boats were met and the fish inspected by the head curer, a man of many years experience. At such inspections all fish containing black feed or which had been caught too long or were unfit for any reason for salting were sent into the meal plant and not processed for salt herring.

Processing of this shipment started immediately upon the fish reaching the saltery. The herring were carried up a conveyor which has an automatic sorting device based on the size of the fish and passed directly to the gibbers, a group of women who perform the duty of removing the pectoral fins, the gills and the main intestine. The gibbers also reject any fish which are too small, too soft or which have been damaged or are in any way unfit for salting and which may have escaped the primary inspection (Aps. 123). Rejected fish are dropped into a hole readily available to each gibber and ultimately pass into the meal plant.

Atfer gibbing and culling the herring were salted, roused and packed in half barrels. When the half bara hole drilled in the side and about a half gallon of rels were full they were headed, placed on their sides, saturated brine solution poured inside. A bung was inserted in the hole and each barrel placed in the warehouse for curing (Aps. 112).

In curing, the barrels were stored under cover in the plant for a period of seven to twelve days. Curing is completed in seven days, but the average time allowed is ten days. During curing the herring are dehydrated to a certain extent and shrink approximately 20% in bulk (Aps. 113).

After curing and usually about ten days after being originally packed the barrels were opened and repacked. This is made necessary in order to completely fill the barrels, the contents of each having shrunk about 20% as indicated. Each barrel had the date of original pack indicated on the bottom and re-packing was done in units of one days pack. Contents of some of the barrels were dumped into a tub. The bungs were removed from the remaining barrels as they stood on end, the brine permitted to run out down to the level of the bung hole and the barrel filled to the top with fish from the tub. Each barrel was tested with a salometer and the brine strength made to fall in each barrel within the range of 85% to 90% of saturation. The barrels were then re-headed and stored in the warehouse to await shipment (Aps. 143).

Such re-packing continued right down to the arrival of the "DENALI" on August 23, 1946. A large number of the barrels were opened, inspected, repacked and re-brined during the last few days preceding the arrival of the "DENALI." Each of the barrels was fully inspected by Mr. Wakefield at the time of re-packing at which time he handled the fish to determine the extent of the cure (Aps. 130). At no time was any spoilage or deterioration of any kind detected in the shipment by appellee and when last seen by appellee the contents of each barrel were firm and in excellent condition.

After final inspection and re-packing the shipment was stored in appellee's wet, cool warehouse to await shipment. The warehouse is covered and has nothing

in it which might generate heat. It is extremely cool because of the use of a great deal of water in the plant and is situated over the water on a dock resting on piling. The warehouse is about twelve feet high and both the warehouse and dock face in a general northeasterly direction (Ex. 8).

Somewhere between three and five days before the arrival of the "DENALI" about 400 barrels of the processed herring were placed on the northeasterly end of the warehouse on the dock. They were tiered three high and piled from the wall of the warehouse up toward the face of the dock on their sides. The pile was covered with salt sacks and tarpaulins and wet down frequently with a hose in order to keep them cool (Aps. 127). Mr. Wakefield personally engaged in wetting the barrels down and did so as dictated by his judgment and experience. Appellee kept in touch with respondent's agent in Kodiak by radio and knew when the "DENALI" was to arrive at Port Wakefield (Aps. 150). During the morning of August 23 the salt sacks and tarpaulins were removed from the 400 barrels. The vessel arrived at 11:58 a.m. on that day.

Mr. Wakefield made weekly trips to Kodiak during the period involved in this action and has been in the area of Port Wakefield for many years. He testified the weather conditions at Port Wakefield and Kodiak are almost identical. There is a United States Weather Station at Kodiak, but none at Port Wakefield.

July, 1946 was cooler and wetter than usual at

Port Wakefield (Ex. 9). The maximum temperature attained during the July portion of processing of this shipment was on July 26 and 27 when 70°F. was attained. These were unusual days as the mean for the month was only 54.2°F. Only one clear day was recorded in July. There were eighteen entirely cloudy days, twelve partly cloudy.

August, 1946, was one of the coolest on record in Alaska, although rainfall was slightly below normal. The maximum temperature attained at Port Wakefield was 66°F. on August 20. The mean for the month was 53.3°F., a deviation of —1.4°F. below normal. There were no clear days in August; twenty days were entirely cloudy and eleven partly cloudy. There were nineteen days with rainfall in excess of .01 inch.

The shipment involved in this action was one of several during the 1946 season. There was a shipment preceding it in July and several which followed it. The processing of the shipment was identical in all respects with the method followed by Mr. Wakefield for 32 years previous. No losses from heat damage or spoilage of any kind have ever before occurred to Mr. Wakefield in following this procedure.

B. QUESTIONS INVOLVED

An additional question not touched upon by appellant but definitely involved herein is as follows:

1. If the evidence discloses delivery of a cargo of barreled salt herring to a vessel in good order and condition and delivery by the vessel at Port of destination in bad order and condition due to the contents being damaged by excessive heat, is the shipper and owner of the cargo entitled to judgment against the carrier for his damage in the absence of a showing by the carrier that the damage was due to some cause for which the carrier is not liable under applicable law?

This question is raised by the pleadings and has been inherent in the cause by its very nature throughout all of the proceedings. It was recognized by appellant in its affirmative defenses in which it alleged the applicability of the Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 *et seq.* and set out alleged defenses based on inherent defect, quality or vice of the goods shipped aboard, faults or errors in navigation or in the management of the vessel and delay in discharge due to a maritime strike.

II.

ARGUMENT

A. ARGUMENT IN ANSWER TO APPELLANT

1. In General

Appellee desires to divide its argument into two main sections. The first will be addressed to answering the arguments of appellant and the second will be

an argument in support of the judgment. In answering appellant, appellee will divide its argument into the same main headings adopted by appellant.

One thing, however, should be made clear. Appellee has at all times maintained the position that it is entitled to judgment upon proving by a preponderance of the evidence, delivery of the cargo to appellant in good order, arrival of the cargo at destination in bad order, and the extent of appellee's damage. Appellee has further contended that upon proving these ultimate facts the burden fell upon appellant to establish that the loss was one from which appellant is exempted from liability by applicable law.

Appellant has artfully contrived to divert its argument from these basic points. While appellants arguments on the wholly immaterial and divergent points raised in its brief are easily answered and while appellee will undertake to do so, appellee does not thereby wish to give the impression that it has receded from its basic stand as above indicated.

For example, on the matter of arrival at destination in bad order appellee contented itself with showing the condition of the fish on arrival including the temperature thereof; that the extent of damage varied in accordance with the temperature; that the highest temperature recorded in one of its spoiled barrels was 77°F.; that the only possible place such a temperature could have been acquired was aboard the vessel where a temperature of 80°F. was recorded. All of the evidence as to stowage, the degree of temperature and the lapse of time required to spoil the herring and other extraneous matters were either brought

on cross-examination of appellee's witnesses or through appellant's witnesses or by appellee on rebuttal. Appellee proved the three ultimate facts of (1) delivery to the carrier in good order, (2) arrival at port of destination in bad order, and (3) the extent of its damage, and in addition proved that the bad order of the fish was caused by excessive external heat.

2. The Evidence—Good Order and Condition

Lee H. Wakefield testified in detail as to the exact manner in which this shipment was processed prior to delivery aboard the "DENALI." His testimony covers the entire period of time from arrival of the fish at the saltery to its being placed aboard the "DENALI." While his testimony details a process which he successfully followed without a single loss from heat damage for thirty-two years it nevertheless clearly appears that this process is the identical one through which this shipment progressed (Aps. 121).

Appellant would make some point of the fact that some of the barrels in this shipment were held at appellee's plant for as long as 30 days. The testimony of Mr. Wakefield established that this had been his usual practice for 32 years, without any loss whatsoever. Such evidence, wholly uncontroverted, is a complete answer to what is no more than a smoke screen innuendo. There is a complete lack of testimony that holding of salt herring at the saltery for 30 days or more will result in damage.

There is in addition no testimony whatsoever to contradict the evidence that the portion of this ship-

ment piled on the dock was covered with tarpaulins and salt sacks and thoroughly wet down at all times. Appellee was notified by wireless of the time when the "DENALI" would arrive at its saltery on August 23 (Aps. 150). The salt sacks and tarpaulins were not removed until shortly before the vessel arrived (Aps. 152).

Ex. 9 shows that .02 of an inch of rain fell in the Port Wakefield area on August 23, and that the maximum temperature attained on that day was 57°F. It is a reasonable inference from these facts that the day was quite cloudy. Even assuming that there may have been intermittent periods of sunshine during the morning, the physical facts negative any possibility of damage to the barrels. They were piled against the wall of the warehouse, which faces northeast. The warehouse is 12 feet high. The sun does not get directly overhead at the latitude of Port Wakefield, but swings in a long low arc from northeast to northwest. The early morning sun might strike the barrels, but during the rest of the day they would of necessity be in the shade. Because of their curved sides, only a small portion of each barrel could ever be exposed to the sun at any given time. They were tiered three high, on their sides, so that only the topmost row would ever be exposed in any event.

These uncontrovertible physical facts overwhelmingly demonstrate the utter impossibility of these barrels picking up sufficient heat at Port Wakefield so that 12 days later they would still register 77°F. inside the barrels. The only place such heat was ever

found to exist in this entire proceeding was in the hold of the "DENALI."

It is quite true that these herring were a mild or Scotch cure, which is not as strong as a Norwegian, or heavy cure, and therefore more perishable. But they were the same strength of cure which Mr. Wakefield had been producing for 32 years without loss.

Appellant suggests that the three week lapse of time between last inspection of some of these barrels may have caused them to spoil. Such an argument assumes that somewhere between three weeks and one day there is a time beyond which such herring should not have been kept at the saltery. Even ignoring the fact that the lapse of time in this case was in all respects normal and had never before caused loss, we come to an uncontrovertible fact which wholly destroys appellant's argument. Every single barrel which went aboard the "DENALI" was damaged. Not one barrel came through unscathed. The cause, therefore, was one which operated uniformly on the entire shipment, and is much more easily explained by the excessive heat of 80°F. registered in the hold of the "DENALI."

The fact of uniform damage to the entire shipment also disposes of appellant's argument to the effect that the sun instead of the heat from the shaft alleys and engine rooms of the "DENALI" might have boiled the oil from the fish. Only about 130 barrels were on the top tiers on the dock. The rest of the shipment was either in lower tiers or under cover. Yet every barrel was injured.

Clearly the sun could not affect the barrels inside the warehouse. The only thing which would affect them would be atmospheric temperature, which never rose above 66°F. and only averaged 53.3°F. in August, 1946, at Port Wakefield.

There is nothing in the evidence to indicate that herring require rainfall to keep them in good condition. The important thing is temperature. Appellant clearly embarks on speculation and conjecture when it states that the fact that August, 1946, had a little less rainfall than usual is a "very material fact." The mean temperature was —1.4°F. below normal at Port Wakefield in August, 1946 (Ex. 9).

It is true that the degree of spoilage was not uniform in all of the barrels. It is not true, however, that any of the barrels were of top merchantable quality. In 1946 herring was very scarce and buyers were eager. Yet none of these barrels could be sold for more than 75% of the going market price.

The reason for lack of uniform spoilage is clearly explained by the witness Kniseley (Aps. 234). The air coming in contact with the hot shaft alleys and engine room bulkhead would pick up heat through the process of convection. Such air would rise until it contacted a cold object, then fall. This tended to create air currents which moved in a haphazard fashion, following the path of least resistance and not operating uniformly on the shipment.

The testimony of Mr. Byrnes, Chief Officer of the "DENALI," and of Mr. Teichroew, the Purser, fall far short of controverting appellee's evidence of good

order and condition. The tendency of such personnel to "stick by the ship" when on the witness stand is well known, and much of their testimony is contrary to the great weight of the evidence as well as the laws of physics. For example, a wooden barrel containing brine could never be "dry (Aps. 234, 235). Capillary attraction would be continually at work transmitting the water to the outside of the barrel, where it would escape to the air by evaporation. The surface of the barrel would always be moist. Again, the conclusion of the witness Byrnes that the weather was "unusually warm for Alaska" is not supported by any temperature reading and is directly contrary to the official findings of the U. S. Weather Bureau.

Again, while Mr. Teichroew contended some of these barrels were "warm to the touch," he did not deem this fact of sufficient importance to make any notation thereof on the Bill of Lading.

The points set out by appellant at page 24 of its brief are answered as follows:

(a) 30 days is a normal time for herring to remain in appellee's plant, without refrigeration. Such procedure has never caused a heat loss in 32 years.

(b) The weather was not "warm" during the period the 400 barrels were piled on the dock (Ex. 9). It averaged only 53.3°F. for the month of August. It was not shown at any place in the evidence that such piling of barrels on a dock will damage herring, nor that the amount of sunlight in these five days could have damaged this herring.

(c) Appellee wholeheartedly agrees that tempera-

ture affects the herring and that the barrels must be kept cool. Appellee kept them cool at all times prior to delivery to the "DENALI."

(d) While August, 1946, had less than normal rainfall, the statement that such month was "warm and dry" is directly contrary to the official opinion of the U. S. Weather Bureau (Ex. 9).

(e) The herring were the same cure which Mr. Wakefield had shipped with Alaska Steamship Company personnel, who were operating the "DENALI" for appellant, for many years. Appellant was bound to know the perishable nature of this cargo and give it proper care.

(f) Admittedly the damage was not uniform. While the "about 400 barrels" may in appellant's opinion coincide with the 354 barrels adjudged unfit for human consumption taken from lower No. 3 hold, it leaves entirely unexplained the 278 barrels likewise unfit for human consumption which came from lower No. 4 hold.

(g) The heat in No. 4 hold was undoubtedly not as intense as in No. 3, as it is farther from the heated engine room. Naturally the damage would not be as bad in No. 4 hold.

3. The Law—"Good Order and Condition"—Concealed Damage.

Appellee concedes that the issuance of a clean Bill of Lading does not ordinarily operate to relieve a shipper of goods in sealed containers of the necessity of proving good order and condition when shipped. However, the cause of damage to this shipment was

excessive heat. One of the things the court is called upon to decide in this proceeding is whether that heat was acquired prior to or during the carriage aboard the "DENALI."

Appellants witness Teichroew, the Purser who signed the Bill of Lading, testified that the barrels were "warm to the touch" when they were being loaded aboard. The conditon this witness says he observed was an *external* one, namely, excessive heat on the outside of the container. Much of appellant's defense is pinned on this shred of testimony. Yet, the witness Teichroew made no mention of this condition on the Bill of Lading.

A clean Bill of Lading has been held to preponderate over testimony of the ship's crew when the damage was externally discernible. In *Stirnimann v. The San Diego*, 148 Fed.(2d) 141, a giant crane arrived in San Francisco with certain of its parts bent, twisted and rusty. Respondent's witnesses testified they observed this condition at the time of loading. In permitting a recovery the court said at page 142:

> "There is here no dispute as to the damaged condition of the crane upon arrival at San Francisco. Respondents contend, however, that libelant failed to prove injury during the course of transportation. We cannot agree. Libelant did put the Bill of Lading in evidence; and the statement therein contained of the apparent good condition of the shipment while not conclusive does amount to initial proof of its freedom from open and visible damage prior to transportation."

4. Appellee's Burden of Proof

In this case appellee's evidence has covered every period of time from the receipt of fish at the cannery to delivery aboard the "DENALI." It is true that final inspections of these barrels occurred from August 4th or 5th down to August 23rd when the "DENALI" arrived so that of necessity some of the barrels had not been looked at for some 18 or 19 days. However, some of them had been inspected and found good not later than the day before shipment, and possibly some even on the very day they were shipped. Nevertheless, every single barrel in the shipment was damaged on arrival at port of destination. There can be no question of the good order of those most recently inspected —nevertheless they all outturned bad at Seattle. The inference is compelling that we must look elsewhere than appellee's plant for the cause of the damage.

An outstanding fact which must be borne in mind is that the cause of this damage was excessive heat. The evidence of appellee conclusively establishes that these barrels did not have heat of anything like 77°F. in them when loaded aboard the "DENALI." There is no source of heat in appellee's plant, and the barrels had been subjected to a mean temperature of only 53.3°F. during their storage at the plant. This alone should be sufficient to establish the good order and condition of this shipment.

Rules of law should be and usually are applied in reasonable consonance with the facts and conditions in each case. Appellant suggests by its argument that appellee should have inspected each of these barrels at the time of loading, or suffer the penalty of never

being able to prove the shipment was in good order and condition. However, the opening, dumping, refilling, re-coopering and recording of the temperature of each of these barrels would impose an unreasonable burden on both shipper and carrier. It is improbable that any vessel would tie up and await the completion of such a procedure as it is wholly impractical and if encountered at each saltery and cannery would greatly lengthen any voyage into Alaskan waters.

It is submitted that the evidence of appellee covers every practical means of showing the good order and condition of this shipment. To hold otherwise would be to completely deny shippers of all goods in sealed containers the right to recover for internal damage occurring to their goods while in the custody of the carrier.

The cases of *Bronstein Bros. & Co. v. Societa Anonima, etc.*, 25 F.(2d) 122 (E.D.N.Y.), *Pan American Hide Co. v. Nippon Yusen Kaisha*, 13 F.(2d) 871 (S.D.N.Y.), *The California*, 4 Fed. Cas. 1058, case No. 2314 (D.C. Ore.), and *Vernard v. Hudson*, 28 Fed. Cas. 1162, case No. 16,921 (C.C.D. Mass., Storey, J.) all differ from the instant case in one significant fact. In each case there is a gap in libelant's testimony. Some period of time existed in each of these cases during which the condition to which the shipment was subjected were left to speculation and conjecture. That is not true in this case. The temperature is shown for each day this shipment was at appellee's saltery—and never did even approach the 77°F. found in the barrels at Seattle. There is no

intervening carrier nor any lapse of time not accounted for in the evidence.

Appellant contends that the evidence of similar shipments carried in these same holds on other voyages affords a proper basis for inferring that these holds were proper for the carriage of this cargo. Such is not the law. In *The Richelieu*, 1931 A.M.C. 721, 48 F.(2d) 497 (C.C.A. 4), action was brought for recovery of damages sustained as the result of an explosion of pitch dust alleged to have been due to negligence. Respondent railroad attempted to escape liability by showing it loaded the pitch in the same manner as coal was ordinarly handled and thereby adherred to a standard of due care. The court said:

> "* * * the mere fact that they had loaded coal with the same machinery and with similar open lights without explosion and that they had been assured that pitch would load like coal offers no excuse for the negligence. In loading coal the dust was kept down with the sprinkler system which was not used in loading pitch; and it is a matter of common knowledge that the danger of explosion in a dust cloud is dependent upon its acquiring the proper density and the fact that no explosion resulted in the loading of coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there. Negligent methods of operation do not always or even generally result in disaster. The inquiry is not whether a method of operation has been used without disastrous results, but whether it is of such a character that danger of injury is reasonably to be apprehended from its use. Where the element of danger is

present successful operation is to be deemed 'fortunate rather than prudent'."

Although not an appellate decision, the *Ensley City*, 71 F. Supp. 444, decided by the United States District Court for the District of Maryland on March 27, 1947, is factually similar to the instant case. Recovery was sought for damage to a cargo of licorice extract stowed in No. 4 'tween decks just aft of the engine room. The cargo was melted by the heat and merged into a solid mass when the heat was reduced. The opinion recites:

> "We excluded all of these records because of the obvious probability of there having been such variations in other important factors from voyage to voyage as would materially affect temperatures below decks * * *. Also the proferred temperature records taken on other voyages of this same vessel could not be said to have much, if any, probative weight if other important factors are not precisely known such as the condition of the hatches; the extent to which they may have been open or closed before or at the time the temperatures were taken; and whether the ventilators even though the same in character, number and location were set for operation at the same angle, and whether there were strong or light winds and from what points of the compass."

5. No Evidence of "Excessive Heat".

Appellant seeks to discredit the evidence of 80°F. in the hold of the "DENALI" by showing the effect of shutting down the vessel due to strike. Such evidence is inconclusive. If it be true that shutting down in-

creases the temperature, then a necessary inquiry would be to what extent and over what pre-existing temperature. There is no evidence that the boilers of the "DENALI" had been fired after she tied up at 6:40 p.m. on September 4. There is no reason to believe they were as her only duty was discharge and her winches are electric (Aps. 337). It is just as reasonable to assume that upon docking the fires were extinguished and the temperature in No. 3 hold began to decline. The extent of such decline is left to speculation. The 80°F. temperature may well have been far below the temperature existing in this hold under the conditions obtaining during the voyage.

As to the latter we are wholly uninformed. The evidence does not disclose whether there are any fans or other devices for cooling the hold. Nor does it disclose whether there are ventilators; whether they were open or closed, nor how they were trimmed, nor the direction of prevailing winds during the voyage. For all the record shows the heat from the engine room and the steam pipes in the shaft alleys may well have risen to tremendous heights during this voyage.

For these obvious defects it is apparent that both the evidence of appellant as to the effect of shutting down and the evidence of appellee as to an 80°F. temperature is inconclusive. The evidence of appellant really proves nothing and the evidence of appellee proves only that under the circumstances which then existed a temperature of 80°F. could be and was attained in the hold of the "DENALI." However, the fact that it was attained during the voyage is proved beyond all doubt by the fact that after 19 hours of cool-

ing on the unheated dock at Seattle the cargo was found to contain temperatures of 77°F. This evidence alone is free from doubt or speculation and therein lies the proof of excessive heat.

6. Lower Court Erred in Finding "Excessive Heat".

On all of the evidence in this case the cargo had not been subjected to excessive heat up to the time it was loaded aboard the "DENALI." The temperature to which it had been subjected was below average and the average temperature had caused no damage to similar cargoes for 32 years.

The evidence is clear that the damage to this cargo was caused by excessive heat (Ex. 12, Aps. 207, 259, 447).

No other factor has been mentioned which causes the oil to leave the fish and rise to the top of the barrel and the evidence discloses that this is the only cause thereof (Aps. 259, 260). The only source of such heat in the entire case is the hold of the "DENALI." Under the circumstances the court's finding was justified and no other could properly have been made.

7. Inherent Vice—Burden of Proof of Damage Aboard Ship.

In discussing this question it is well to bear in mind that the cause of damage to this cargo was heat. All of the evidence so indicates and there is none to the contrary. The appellant so concedes when it argues that the bleak Arctic sun produced sufficient heat to last through 13 days and still register 77° in the heart of one of the barrels.

The proof uncontroverted establishes that the herring were packed in brine of a strength 85% to 90% of saturation (Aps. 144). Such a strength is sufficient to keep the fish from spoiling under normal shipping conditions. However, it has nothing to do with boiling the oil from the fish. Only elevated temperature will do this (Aps. 259, 260). Even if the fish spoiled in a solution too weak to preserve them the temperature of the barrel would not rise one whit (Aps. 218, 219). The question of inherent vice therefore becomes irrelevant in this case, it being clear that there was no condition in the barrels which could cause an elevated temperature. The only possible source of such heat is from external application of heat.

In *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera, et al.*, 81 F. Supp. 438, cited by appellant, the court accepted as sufficient proof evidence of the customary method and procedure of preparing the cargo for shipment saying at page 447:

> "There must, of course, be some practical limits to the shipper's obligation. In *The Neil Maersk, supra*, where spontaneous heating of fish meal was involved, the shipper offered no admissible evidence of good condition. Here there is a voluminous testimony by tobacco men on the scene as to inspection and proper preparation of most of the tobacco shipped including the Cavalla belonging to Brown and Williamson and the Volos lots. It appears that Greek tobacco prepared for shipment is handled similarly by all shippers to the United States and that the tobacco here involved was handled in the customary manner."

The opinion then discloses that certain of the lots of tobacco affected by the testimony mentioned above were damaged by *external* heat received from some of the bales which fermented and self-heated. Recovery was allowed as to the bales so damaged by *external* heat, the court accepting the evidence of customary preparation as being sufficient to establish good order and condition of the cargo at the commencement of the voyage.

The case of *Albers Bros. Milling Co. v. Hauptman*, 95 F.(2d) 286, was one in which it was affirmatively established that the corn there shipped contained an inherent defect consisting of an excess percentage of rancidity and acidity. That fact alone distinguishes it from the instant case. Also in that case the evidence disclosed that the heating came from within the kernels, not from an outside source as in this case.

Appellee having excluded all sources of heat other than the hold of the "DENALI" it is submitted that it has fully established that the damage occurred to this cargo while in the custody of the carrier.

8. Inherent Vice Is Relative.

Appellee has no quarrel with appellant's arguments under this heading as applied to the decided cases therein cited. However, the argument is inappropriate to the instant case and entirely beside the point involved herein. It assumes that the vessel afforded ordinary and usual conditions in the carriage of this cargo, which is obviously not the case. Stowage of herring under conditions producing a heat of at least

80°F. in the hold and 77°F. still in the barrels 19 hours after discharge can hardly be called ordinary normal stowage.

The barrels were processed and cured in exactly the same fashion under the same conditions which this shipper had maintained without loss or discovery of heat in the barrels for over 32 years. Clearly the deviation from the norm was on the part of the ship, not the shipper. Had the ship afforded the customary and ordinary stowage this loss would never have occurred.

9. Third Assignment of Error Relied Upon.

Appellant has raised the affirmative defense of "strike exception" and thereby assumed the burden of proving it. The evidence in favor of appellant establishes only that a strike occurred, that a portion of this cargo was not unloaded until September 25, 1946, and that upon discharge it showed the same evidence of heat damage found to exist in that portion of the cargo discharged from No. 3 hold.

That this evidence falls far short of establishing by a preponderance of the evidence that any damage occurred because of the strike is clearly shown by the following:

1. Appellant failed to show the condition of this portion of the cargo at the time the strike started and that it was any worse when the strike ended.

2. It failed to show that discharge of the vessel was in any way hindered or prevented by this strike.

3. It failed to show that proper cooling, ventilating

and other care of the cargo was in any way prevented by the strike. The mere occurance of the strike should not entitle the carrier to simply throw up its hands and relieve itself of all duties toward the cargo.

4. It failed to show that the strike produced any condition likely to damage the herring. Exhibit 10 discloses an average temperature during this period of 61° F. and there is no evidence that exposure to this temperature would in any way damage the fish.

5. If it be assumed that there were some conditions arising out of the strike which contributed to the bad order of this shipment, appellant has failed to show what portion of the damage is due to such cause. In *The Lake Fabyan*, 283 Fed. 771, an issue of delay in discharge was raised by the vessel. The cargo involved was potatoes which were damaged by failure of the vessel to ventilate properly. At page 773 of the opinion the court said:

> "This decaying condition being due to the negligence of the respondents in possession of the goods the burden was on them to show what portion, if any, of the damage was due to the unavoidable delay in discharging the cargo. They cannot put the burden on Branch who had no control of the potatoes, of proving what portion, if any, of them would have been saved had the cargo been promptly discharged."

B. ARGUMENT IN SUPPORT OF THE JUDGMENT

Appellee has heretofore in this brief argued its position sufficiently on the matter of delivery to the "DENALI" in good order, arrival at destination in bad order, and the extent of its damage. Having proved

these points it is appellee's position that appellant was then required to either rebut or disprove such evidence or asume the burden of showing that the cause of the loss was something from which appellant is excused from liability pursuant to law. This appellant has wholly failed to do and it is appellee's position that the trial court's decision was therefore entirely correct.

The rule in this respect was early adopted by the Ninth Circuit in *The Medea*, 179 Fed. 781, decided in 1910. One of the questions raised on appeal was that relating to burden of proof, respondent contending that inasmuch as the libel alleged that the damage to the cargo resulted from unseaworthiness or bad stowage the burden of proof in this respect was on libelant. In reversing the District Court and awarding a decree for libelants the court said at page 786:

> "These cases settle the rule beyond controversy that with respect to the liability of a common carrier for loss or damage to goods while in his possession the question as to the burden of proof is not one of pleading but of primary liability which the carrier must meet according to the tenor of his contract."

Again at page 792 the opinion stated:

> "In the present case the burden of showing the connection between the damage by sea water and the exception against sea perils has not been discharged by the carrier. The cause of the damage to the cargo has been left to conjecture and we must look elsewhere for a satisfactory explanation. But libelants have not relied entirely on the inability of the respondent to prove that

the damage to the cargo arose from perils of the sea. They have introduced evidence tending to prove that the damage was caused by bad stowage. We will now proceed to consider that question."

The opinion then goes on to set out the evidence regarding stowage which was by masters of vessels and other qualified persons tending to show not enough weight had been placed in the 'tween decks to give the vessel the proper stability, therefore she rolled more than she should and shipped water. This was accepted by the court as sufficient evidence of bad stowage. In reaching its conclusion the court set forth the following quotations from the opinion indicated:

"The burden of proof lies on the carrier and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference founded on doubtful and conflicting evidence but should be specific and certain leaving no room for controversy between the parties." *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. 347, (382) 12 L. Ed. 465.

"After the damage to the goods therefore has been established the burden lies on the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading." *Clark v. Barnwell*, 53 U.S. 272, 13 L. Ed. 985.

"When goods in the custody of a common carrier are lost or damaged the presumption of law is that it was occasioned by his default and the

burden is upon him to prove that it arose from a cause for which he is not responsible." *Nelson vs. Woodruff*, 66 U.S. 156, 17 L. Ed. 97.

"The burden of proof lies on the carrier and nothing short of clear proof leaving no reasonable doubt for controversy should be permitted to discharge him from duties which the law has annexed to his employment." *The Mohler*, 88 U.S. 230, 22 L. Ed. 485.

And also in the same opinion at page 786:

"The reason why the burden of proof is placed upon the carrier is that he or his servants know or at least ought to know the circumstances connected with the loss or damage to the cargo while the owner of the lost or damaged goods has no such knowledge and if he were required to furnish such proof it would operate as a denial of justice."

In *The Folmina*, 212 U.S. 354 action was brought to recover for damage to a cargo of rice damaged by the entrance of sea water. The evidence did not disclose the manner in which sea water entered the hold. In permitting a recovery the court said at page 363:

"As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier."

Perhaps the leading case on this point is *Schnell vs. The Vallescura*, 293 U.S. 296, where suit was brought to recover damages for injury to a shipment

of onions. It appeared that the onions were delivered in good order and condition, but arrived at destination in a state of decay. The evidence tended to show that the decay arose from the failure of the ship to properly ventilate the cargo. It was further apparent that lack of ventilation was excused for a portion of the voyage due to heavy weather, but that the ventilating system was also closed down during good weather. The Libelant did not attempt to distinguish between the damage occurring due to the failure to ventilate during heavy weather and that attributable to the failure to ventilate during good weather. Respondent therefore argued that Libelant had failed to carry the burden of proof by showing the damage expressly attributable to Respondent's negligence. In dismissing this contention and permitting a recovery the court said at page 304:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. (Citing cases)
>
> "To such exceptions the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it."

In *United States of America vs. Los Angeles Soap Co.*, 83 Fed. (2d) 875 (CCA9, 1936) the action was for recovery of damage to a cargo of cocoanut oil which was contaminated by fuel oil, and for a shortage of oil. Respondent showed that the damage was not caused by unseaworthiness, that it was partially caused by stranding resulting from a cause excepted by the bill of lading and the Harter Act and partly by failure to care for the cargo after stranding. In permitting a recovery the court said at page 880:

> " The burden of showing that damage to cargo arose from one of the excepted causes is on the shipowner." (Citing cases)

Again at page 881:

> "Finally if the loss to cargo is caused by an excepted cause and by the shipowner's negligence in the custody of the consignment the shipowner has the burden of showing what damage is attributable to the excepted cause and what loss has been the result of his own negligence." (Citing *Schnell vs. The Vallescura*, 283 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373)

In *Waterman Steamship Corporation vs. United States Smelting, Refining & Mining Co.* (C.C.A. 5 1946), 155 Fed. (2d) 687, the action was to recover for 13 pieces of steel plate lost from the vessel in transit from Baltimore to Seattle. The bill of lading contained a provision expressly incorporating all of the provisions of the Carriage of Goods By Sea Act therein. The steel plates were piled on deck and the 13 were lost because a pelican hook securing the same straightened out during the voyage, permitting the plates to slide over the rail into the sea. The carrier

contended among other things that where goods are carried on deck the owner has the burden of affirmatively proving that the loss was caused by negligence in stowage or care; that the loss was occasioned by a latent defect in the pelican hook; that the loss was due to peril of the seas for which respondent is not liable. Libelant was permitted to recover. At page 691 the court said:

> "Upon the carrier is placed the burden of going forward to show a peril of the sea or a latent defect; it also has the risk of non-persuasion."

Again at page 693 the court says:

> "Where it is doubtful whether a latent defect or a peril of the sea exists even in the absence of proof of any negligence the carrier has not carried its burden of proof. Therefore, we need not consider whether the carrier owed the shipper any duty of care in stowing the steel on board and whether the carrier discharged any such duty.
>
> "In summary, the shipper may recover for the loss of the steel on either of two grounds: (1) The carrier did not bear its risk of non-persuasion in proving that a "peril of the sea" caused the loss; or (2) the carrier did not bear its risk of non-persuasion in proving that the "latent defect" caused the loss."

The Lake Fabyan, (supra), 283 Fed. 771, as hereinbefore stated, was an action to recover for damage to barrels of potatoes, which the court concluded was due to lack of ventilation. On the issue as to the cause the opinion states:

> "On behalf of the carrier there was testimony that the ventilation was sufficient and

some witnesses testified that perishable vegetables could be and had been carried on a voyage of like course and duration without ventilation. But the great weight of evidence from both sides was that ventilation is necessary to prevent decay. It is within common knowledge that it could hardly be otherwise. The construction of the ship and the method of stowing the potatoes need not be set out in detail. They were stowed from the hold upwards to the deck. Extra between decks had been placed on the ship. The hatches of the lower decks were closed and freight stowed over them so as to shut off air from that source. In addition the potatoes were subjected to some heat from the engines."

The Supreme Court of the United States adopted this rule long ago in *Clark v. Barnwell*, 12 How. 272, and has ever since adhered to it. The action was one to recover for damage to boxes of cotton thread which became mildewed on the voyage from Liverpool to Charleston. At page 132 the court said:

"And the main question in the case is whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading. For, as the masters and owners like other common carriers may be answerable for the goods although no actual blame is imputable to them and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss the question is not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods but whether is was occasioned by any of those causes which, either according to the

general rules of law or the particular stipulations of the parties afford an excuse for the non-performance of the contract. After the damage to the goods therefore, has been established the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading and even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and intention on the part of the persons employed in the conveyance of the goods; for then it is not deemed to be in the sense of the law such a loss as will exempt the carrier from liability but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although a loss occur by a peril of the sea yet if it might have been avoided by skill and diligence at the time the carrier is liable."

Appellant endeavored to show that conditions in lower No. 3 and No. 4 holds were such that it was impossible for herring to get hot while being transported therein. It also attempted by its evidence to eliminate bad stowage and steam pipes as the possible cause of the damage. In this it wholly failed to meet the burden which the law imposes. While not an appellate decision, *The Ciano*, (DCED, Pa. 1946) 69 Fed. Supp. 35, is a case which contains persuasive language. The action was to recover for damage to a cargo of paprika. The paprika was delivered in good order and outturned stained and caked and wet. Among the defenses

interposed by respondent was their assertion that the damage must have occurred prior to receipt of the cargo on board The Ciano and that it could not have happened on The Ciano. In finding for libelant the court said at page 40:

> "While the preponderance of the evidence eliminates certain possible causes of damage, as condensation and ship's sweat in lower hold No. 2 it does not lead to the conclusion that the damage could not have occurred while the paprika was within the range of the carrier's duty to properly and carefully handle, carry, keep and care for it. See 46 USCA Sec. 1303(2). The condition of the cargo of thyme in the No. 2 lower hold on discharge at Philadelphia is not particularly helpful in view of the lack of evidence as to the location of the thyme in the 'tween deck.
>
> "Under the circumstances the only reasonable conclusion is that the evidence adduced by the respondents discloses that they cannot account for the damage to the paprika.
>
> "The libelant's *prima facie* case of receipt on The Ciano in good condition must stand. The cargo was delivered in bad condition. The respondents have failed to show either that the damage did not occur aboard the vessel or that however it occurred it was not due to or contributed to by the fault of the carrier, it agents or its servants. Accordingly the libelant is entitled to recover herein."

Where the cause of damage is left in doubt, the loss must fall on the carrier. See *Armco International Corporation v. Rederi A B Disa*, 151 F.(2d) 5, (CCA2, 1945), an action to recover for damage to

1313 iron plates damaged in transit by reason of the vessel loading a leaking barrel of acid on top of the plates. The acid corroded the plates. After discharge they were all mingled together and the damage did not become apparent for some time. The vessel argued that it should not be held for the entire damage because it was not shown how much occurred aboard the ship. The court in rejecting this contention and affirming a decree for libelant said at page 8:

> "So far as there is any uncertainty as to the extent of the damage which happened while the plates were on board the ship has the burden of proof. *Schnell v. Vallescura*, 293 U.S. 296, 55 S. Ct. 194, 79 L.Ed. 373; *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 314 U.S. 104, 62 S. Ct. 156, 86 L.Ed. 89; *United States v. Los Angeles Soap Company*, CCA9, 83 F.(2d) 875; *Wessels v. The Asturias*, CCA2, 126 F.(2d) 999; *Edmond Weil, Inc. v. American West African Line*, CCA2, 147 F.(2d) 363."

See also *Sanib Corporation v. United Fruit Co.*, (DCSDNY, 1947) 74 F. Supp. 64. This was an action to recover for damages to banana powder which was completely destroyed in value by reason of exposure to the action of water or steam. Libelant's evidence showed that the banana powder was manufactured in its factory at Puerto Cortes; the details of storage awaiting shipment were shown and the highest temperature attained by the weather appears in the evidence, including all the periods up to the time of shipment. It further appears that

the banana powder was stowed in the after end of the upper 'tween deck which has a steam pipe line running along overhead from the engine room to the steering engine. A flange existed in this steam pipe line directly over the point where the banana powder was stowed and this flange was leaking. The cargo was transshipped from the first vessel and at this point it was learned that the banana powder had become spongy and plastic . When the powder gets in this condition it is wholly valueless. There were other transshipments thereafter and the evidence does not disclose what happened to the sacks after leaving the first vessel. Respondent was not permitted to escape liability upon the theory that there was no showing of how much damage occurred aboard its vessel, the court saying at page 66;

> "This is a case therefore where clearly the cargo came by at least some of its damage after having been taken in the ship. Therefore the burden is upon the respondent (*Vizcaya*), (DCEDPa, 1945,) 63 F. Supp. 898) to absolve itself from fault and to bring itself within the causes excepted in the statute and upon which it relies. *Carriage of Goods By Sea Act*, Sec 4 (2) (i, m, n, p, q), 46 USCA 1304 (2) (i, m, n,p,q). And even if it could be found that there were concurring proximate causes of the damage only one of which was attributable to the respondent, the burden would be upon the latter to distinguish between the damage caused by its fault and that which was not. *Schnell v. The Vallescura* (1934) 293 U.S. 296, 55 S. Ct. 194, 79 L. ed. 373."

In the same opinion appears the following at page 67;

> "Considered in one aspect a leaky steam line in cargo space obviously constitutes unseaworthiness and although the mate of the SS Howard was called there was not the slightest effort to demonstrate due diligence to make seaworthy. In another aspect it was negligence on the part of the respondent to stow cargo like banana powder in space where it was subpected to the known hazards that a leaky steam line would produce, at least unless it was impossible to prevent the leak by the exercise of due care."

Also in point is *The Mangalia*, 69 F. Supp. 688 (DCSDNY, 1946) an action to recover for damage to bales of skins which had become wet in transit. It appears from the opinion that the moisture came from a cargo of Valonia which has a high moisture content as well as from improper ventilation. This is, however, only an inference from the fact of stowing Valonia in the same space as the skins. Delivery in good order was shown. At page 693 the court said:

> "From the evidence presented this court is satisfied that the fur skins when delivered to the ship were in apparent good order and when delivered in New York were in a damaged condition. The burden which the law imposes on the carrier of goods to explain the damage or bring himself within an exception which would excuse him has not been met in this case."

3.

CONCLUSION

The contentions of appellee may be summarized in the following manner:

1. Good Order and Condition.

The lower court's finding of good order and condition is amply supported by appellee's evidence of adherence to a tried and tested method of preparation, subjection of the cargo to a uniformly low temperature at all times when in appellee's possession and under its control, inspection of portions of the cargo right down to the approximate time of shipment, and by the issuance of a clean bill of lading.

2. Arrival at Destination in Bad Order.

The cargo from lower No. 3 hold was found damaged immediately on being landed and after cooling for 19 hours was still found to contain 77°F. of temperature. The only source of such temperature was the hold of the "DENALI" which registered 80°F. The cargo from lower No. 4 when landed on September 25 showed the identical type of damage found in that unloaded from No. 3 hold.

3. Damage.

Both parties agree that appellee's damage is $18,783.92.

4. Appellant's Burden of Proof.

Appellant has wholly failed to prove any inherent vice in this commodity which will cause heating. The evidence is all to the contrary. It has wholly failed to show where the cargo while not under its care and control was subjected to conditions which would cause it to contain heat of 77°F. on arrival at destination.

Appellant has abandoned its other affirmative defenses except that of strike. It is not proved that the strike caused any specific conditions detrimental to this cargo, nor has it attempted to segregate the damage it alleges was due to the strike from that due to other conditions.

Appellee therefore contends that the judgment of the trial court should be affirmed.

Respectfully submitted,

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